OLGA MARTINEZ and NORMA PACHECO, in her individual capacity and as Power of Attorney for OLGA MARTINEZ, **v.** **BOP FINANCIAL GROUP, LLC, LISA FARAH CALIXTE, LUIS S. JEAN-BART, PFS INVESTMENTS, INC. d/b/a PRIMERICA, MARIA MORALES, JOHN DOES 1-10, and XYZ COMPANIES 1-10.**	**SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION** **DOCKET NO. A-002643-23T2** **CIVIL ACTION** **ON APPEAL FROM:** **Superior Court of New Jersey Law Division, Hudson County Docket No.: HUD-L-003054-23** **Sat Below: Hon. Joseph A. Turula, P.J. Civ. D.** **Date of Submission: July 2, 2024**

DEFENDANT-APPELLANT PFS INVESTMENTS, INC. D/B/A PRIMERICA'S MERITS BRIEF

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PRELIMINARY STATEMENT

For more than five years, Plaintiffs-Respondents Olga Martinez ("Martinez") and Norma Pacheco ("Pacheco") (collectively, "Respondents") maintained six investment accounts with Defendant PFS Investments, Inc. ("PFSI"), a SEC-regulated broker dealer. PFSI opened and maintained each account pursuant to an Application, with an incorporated Client Agreement, reflecting Respondents' electronic signatures. In reliance on the Client Agreements, PFSI delivered its promised services to Respondents during the five-year period that they were PFSI clients. The Client Agreements set forth obligations for both PFSI and Respondents and, among other things, contained arbitration provisions providing that any disputes between Respondents and PFSI would be submitted to binding arbitration under the rules of the Financial Industry Regulatory Authority ("FINRA"). The arbitration agreement is standard in the securities industry, with language promulgated by FINRA.

In 2023, after maintaining accounts with PFSI for more than five years, and receiving the benefits of PFSI's investment advice (yielding hundreds of thousands of dollars in investment returns), Respondents withdrew their investments with PFSI and put their money into a purported investment club that had nothing to do with PFSI. When they lost money in this investment club, Respondents sued PFSI in Hudson County blaming PFSI for their losses. When

PFSI moved to compel the dispute into arbitration under the terms of the Client Agreements, Respondents took the position that not only did they never sign the Client Agreements, but that they also did not know there was a written agreement governing their five year investment account relationship with PFSI.

Even if a factual dispute exists over Respondents' electronic signatures, such a dispute does not affect other legal grounds for enforcing the arbitration provisions at issue before the Court. Respondents' position that they can open up an account with PFSI, accept the benefits of the Client Agreement for years, and then avoid the arbitration provision (or other terms of the Client Agreement) based on alleged ignorance that a written agreement governed the terms of their investment accounts is contrary to controlling law and common sense. Independently, Respondents' position that they can agree to an arbitration provision, as a term and condition of accessing Primerica's proprietary computer system, and then refuse to abide by that term and condition, is also contrary to controlling law.

The Trial Court denied PFSI's motion to compel arbitration on the grounds that: (a) despite the fact that PFSI had delivered and Respondents had received five-years' worth of benefits under the terms of the Client Agreements, Respondents were not bound to the arbitration provisions of those Agreements, and independently, (b) Respondents were not required to abide by the PFSI's

website Terms and Conditions that they had agreed to because those Terms and Conditions were deemed not conspicuous enough. The Court misapplied controlling law in both instances. Clear case law, including from this Court, makes plain that Respondents are bound to arbitrate this dispute both because they are subject to the Terms and Conditions of the Client Agreements and because under New Jersey law, the website Terms and Conditions were more than conspicuous enough to govern and accordingly to require arbitration of Respondents' disputes here.

PROCEDURAL HISTORY

On August 29, 2023, Plaintiffs filed their Complaint for alleged investment losses from a product that had no connection with PFSI whatsoever. (Da0001-Da0040). PFSI acknowledged service and timely moved on November 8, 2023 to compel arbitration and stay the proceedings against it pending arbitration.[1] PFSI based its motion on the electronically signed Application and Client Agreement between PFSI and Plaintiffs containing a predispute arbitration agreement.

Plaintiffs filed opposition to the motion to compel arbitration, arguing that

[1] Luis Jean-Bart and Maria Morales (who are Defendants in the trial court) also moved to compel arbitration by way of applications styled as motions to dismiss filed November 10, 2023 and November 14, 2023, respectively. In the event that the Court determines (as PFSI contends) that the claims against PFSI are properly subject to arbitration, then the claims against LJB and Morales should also be compelled to arbitration on the same basis.

they had not signed the Application and Client Agreement and therefore had not assented to the predispute arbitration agreement contained in that document. (Da0063-Da0066). Previously, there had been no indication at all that Plaintiffs contested their signatures or their agreement to arbitrate their disputes.

Given the factual question of their signature raised by Plaintiffs, PFSI supplemented its motion by presenting the Court with a certification authenticating: (1) Five additional PFSI Applications and Client Agreements that also reflected Plaintiffs' signatures and that also contained predispute arbitration clauses with Plaintiffs' electronic signature; (2) documentation (including screenshots) that reflected that Plaintiffs separately registered to be able to access their accounts online through the PFSI Shareholder Account Manager ("SAM") website, and thereby agreed to Terms of Use of that website that also contained an agreement to arbitrate. (Da0071-Da0087).

PFSI also submitted to the Court, by letter dated February 6, 2024, enlarged versions of the website screenshots embedded in the Certification of William Nemetz in further support of the motion to compel. (Da0493-Da0498). During the February 7, 2024 in-person oral argument on the motions to compel, the trial court verbally indicated that Plaintiffs could be given added time to file surreply papers following PFSI's reply with certification, but Plaintiffs did not pursue this and did not submit anything rebutting PFSI's factual showings

contained in that certification. (1T37:23-1T38:19).[2]

The trial court reserved decision at the conclusion of oral argument. (1T48:5-22). Thereafter, Judge Turula rendered his decision during an April 12, 2024 videoconference, and issued a written order denying the motions to compel arbitration the same day. (Da0498-Da0500; 2T16:25-2T18:24). PFSI filed its Notice of Appeal on May 3, 2024 (Da0501-Da0505), and subsequently filed an Amended Notice of Appeal on May 8, 2024. (Da0506-Da0510).

STATEMENT OF FACTS

1. Respondents opened and maintained six PFSI accounts and agreed to resolve all disputes through FINRA arbitration.

PFSI is a SEC registered securities broker-dealer, providing investment services in the United States and Canada. It is regulated by, among others, the Financial Industry Regulatory Authority ("FINRA"), which is overseen by the SEC.

Respondents are former investment clients of PFSI. Pacheco is Martinez's goddaughter and a PFSI joint account holder who was authorized to make financial decision for Martinez under a Power of Attorney. (Da063-Da066). In the spring of 2018, Respondents opened six separate PFSI brokerage accounts with the company and established brokerage relationships that continued at least

[2] Transcript citations with the prefix "1T" refer to the transcript of oral argument on defendants' motions to compel arbitration on February 7, 2024, and citations with the prefix "2T" refer to the transcript of Judge Turula's decision rendered virtually on April 12, 2024.

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five years. (Da072-Da074). Each of the Respondents' accounts were operated and maintained under the terms of a Client Agreement which set forth rights and obligations of both Respondents and PFSI. (Da0072-Da0073). Each of the Client Agreements contained a predispute arbitration agreement, appearing as follows, including relative font size and bolding:

> **PREDISPUTE ARBITRATION AGREEMENT - All controversies that may arise between PFS (as defined above) or its affiliate Primerica Financial Services, Inc. (or any of them or their respective employees and representatives) and me concerning any subject matter, issue or circumstance whatsoever (including but not limited to controversies concerning any account, order or transaction, or the continuation, performance, interpretation or breach of this or any other agreement between PFS and me) shall be determined through binding arbitration by and in accordance with the rules then in effect of the Financial Industry Regulatory Authority (FINRA). Judgment upon any award rendered by the arbitrators may be entered in any court of competent jurisdiction.**

(Da0105-Da0106).

The specific predispute arbitration agreement set forth above is approved by FINRA for all securities industry customers and the FINRA arbitration rules referenced are expressly approved by the SEC, and apply industry-wide.[3]

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[3] *See* FINRA Funding Portal Rule 1200(b)(1) (adopted by SR-FINRA-2015-040 eff. January 29, 2016) (Publicly available at: https://www.finra.org/rules-guidance/rulebooks/funding-portalrules/1200); Regulatory Notice 16-06 (SEC Approval of FINRA Funding Portal Rules and Related Forms, Published Jan. 29, 2016) (publicly available at: https://www.finra.org/rules-guidance/notices/16-06).

After opening the accounts, PFSI mailed Respondents "New Account Confirmations" for each of the six opened accounts, confirming that each had been opened. (Da0076-Da0077; Da0189-Da0210; Da0211-Da0228; Da0229-Da0245). Each New Account Confirmation contained identifying information about the customer, including their stated net worth, tax bracket and investment objectives, along with which mutual fund they bought as an initial investment, among other things. (Da0076-Da0077; Da0194-Da0195).

In reliance on Respondents' Client Agreements, PFSI provided Respondents with substantial investment advice during the five years that followed the opening of their investment accounts. (Da0074-Da0075; Da0097-Da0098; Da0115-Da0116; Da0150-Da0151; Da0168-Da0169; Da0137; Da0185). Respondents made dozens of mutual fund transactions in each of their six accounts, each of which reflected the benefit of PFSI's investment research and advice through PFSI's screening resources, which was curated in light of information about Respondents' investment goals. (Da0074-Da0079). As a result, Respondents earned more than $330,000 in returns in their accounts which they withdrew from time to time as they saw fit. (Da0074-Da0079; Da0255-Da0298; Da0299-Da0324; Da0325-Da0358; Da0359-Da0376; Da0377-0394; Da0409-Da0492). PFSI provided these services and advice per the terms and conditions of the parties' Client Agreement.

2. Respondents registered for Primerica online account access and again agreed to resolve all disputes through FINRA arbitration.

Consistent with securities industry standards and PFSI policies and procedures, PFSI provided Respondents with periodic written statements so they could document, review, and manage their PFSI investments. (Da0077-Da0078; Da0255-Da0298; Da0299-Da0324; Da0325-Da0358; Da0359-Da0376; Da0377-Da0394; Da0409-Da0492). These written statements reflected account holdings and investment performance, as well as confirmations of each purchase and sale. (Da0077-Da0078; Da0097-Da0098; Da0171-Da0173; Da0360-Da0361; Da0378-Da0379; Da0412; Da0424-Da0425).

In addition to receiving these written statements, in 2022, Pacheco (on behalf of both herself and Martinez) opted to register for online access to investment account information through PFSI's proprietary web-based service, Primerica Shareholder Account Manager ("SAM"). (Da0080-Da0081; Da0083-Da0084; Da0190-Da0191). By registering for this access, Respondents were able to access information about their accounts 24 hours per day at www.shareholder.primerica.com. (Da0103-Da0104). In signing up for this service, Respondents agreed to a number of terms and conditions including (again) an arbitration agreement.

Specifically, to sign up for online account access, Pacheco navigated to the webpage www.shareholder.primerica.com. She then clicked a prominent

"**First Time User?**" hyperlink located under the Sign-in button on the SAM home page. (Da0081; Da0493-Da0498). When she did so, she was taken to the "Account Registration" page which stated prominently at the bottom center of the landing page (without the need to scroll down to see it) and with a blue hyperlink: "Your use of this site signifies that you accept our Terms and Conditions of Use." (*Id.*). (Da0081-Da0082; Da0493-Da0498 (hyperlink and blue text omitted)).

Clicking on the Terms and Conditions of Use hyperlink opened a website displaying a PDF copy of the PFSI Shareholder Account Manager Terms of Use ("Terms of Use"). (Da0082-Da0083; Da0395-Da0408). The Terms of Use specifically state on page 2 in all caps and in bold **"THESE TERMS AND CONDITIONS ARE LEGALLY BINDING. PLEASE READ THEM CAREFULLY."** (Da0396). Further, the Terms of Use stress (on page 6) that the customer is agreeing to arbitration by including a bold heading of **"Predispute Arbitration Agreement"** and by using an appropriate font size and clear and unmistakable language, as follows:

> **Predispute Arbitration Agreement**
>
> All controversies that may arise concerning any subject matter, issue or circumstance whatsoever related to use of this Site (including but not limited to controversies concerning any account, or transaction, or the continuation, performance, interpretation or breach of this or any other agreement between PSS and/or PFSI and Authorized User) shall be determined through binding arbitration

> by and in accordance with the rules then in effect of the Financial Industry Regulatory Authority (FINRA).

(Da0400-Da0401).

Pacheco completed registration for SAM access on June 27, 2022 and confirmed her assent to the Terms and Conditions set forth in the PDF, including the predispute arbitration clause. (Da083-Da084). There is no evidence in the record that, prior to doing so, she had any questions, did not understand the Terms of Use, or that she objected to the SEC-approved FIRNA arbitration agreement or the arbitration process. In fact, Respondents did not submit any evidence whatsoever that (1) they had not registered for online account access via SAM in 2022, and/or (2) that they were unaware of the SAM Terms of Use or the predispute arbitration clause. Thereafter, Respondents also had the ability to view the SAM Terms of Use and the Client Agreement at any time when logged in. (Da0085-Da0086; Da0497-Da0498).

LEGAL ARGUMENT

POINT I

THE APPLICABLE STANDARD OF REVIEW IS *DE NOVO*.

Enforceability of an arbitration provision "is a question of law." *Skuse v. Pfizer, Inc.*, 244 N.J. 30, 46 (2020); *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 207 (2019). This Court reviews *de novo* a trial court's order compelling or denying arbitration. *Wollen v. Gulf Stream Restoration & Cleaning, LLC,* 468

N.J. Super. 483, 494 (App. Div. 2021). To that effect, the Appellate Division "need not defer to the trial court's 'interpretive analysis' unless it is 'persuasive.'" *Id.* at 495 (quoting *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 236 N.J. 301, 316 (2019)).

POINT II

THE COURTS RESOLVE ANY DOUBTS IN FAVOR OF ARBITRATION

As this Court has observed: "In our de novo review of the arbitrability of a claim, we consider whether: 1) the parties entered into a valid and enforceable agreement to arbitrate disputes; and 2) the dispute falls within the scope of the agreement." *Interactive Brokers, LLC v. Barry*, 457 N.J. Super. 357, 364 (App. Div. 2018) (citing *Hirsch v. Amper Fin. Servs., LLC*, 215 N.J. 174, 187-88 (2013)). Further, "'[i]n reviewing such orders, [the courts] are mindful of the strong preference to enforce arbitration agreements, both at the state and federal level." *Id.* (quoting *Hirsch*, 215 N.J. at 186). "The Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1-16, and the New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, enunciate federal and state policies favoring arbitration." *Atalese v. U.S. Legal Services Group, L.P.,* 219 N.J. 430, 440 (2014). "An agreement to arbitrate should be read 'liberally to find arbitrability if reasonably possible.'" *Fastenberg v. Prudential Ins. Co. of America*, 309 N.J. Super. 415, 419 (App. Div. 1998). "Any doubts concerning the scope of arbitrable issues

should be resolved in favor of arbitration." *Jansen v. Salomon Smith Barney, Inc*., 342 N.J. Super. 254, 257-258 (App. Div. 2001).

POINT III

THE TRIAL COURT ERRED BY NOT COMPELLING ARBITRATION BASED UPON RESPONDENTS' COURSE OF CONDUCT AND ACCEPTANCE OF BENEFITS OF THE BROKERAGE RELATIONSHIP WITH PFSI. (2T17:25-2T18:24).

For five years, Respondents sought and received considerable benefits from their contractual PFSI relationship, including investment returns in excess of $330,000 and myriad withdrawals. PFSI, relying on the terms of the Client Agreement, provided Respondents with significant advice and services, as well as the means to monitor their investment transactions and performance through not only account statements but also, at their request, an online service where they could review their accounts at their convenience 24 hours per day.

A party who receives and accepts the benefits of a written agreement becomes bound by the terms of that agreement, including a predispute arbitration provision contained in it, even if they contend they never received, reviewed or signed the agreement. *Schwartz v. Comcast Corp*., 256 F. App'x 515, 518-20 (3d Cir. 2007).

In *Schwartz,* an internet subscriber sued Comcast for damages from service outages. Comcast moved to compel arbitration based upon an arbitration provision in a subscription agreement Comcast argued it had mailed to all

customers. The subscriber denied receiving, seeing or signing the arbitration agreement. The Third Circuit concluded that in a "clear and unmistakable manner" the subscriber was bound by the subscription agreement. *Id.* at 518-20 (applying Pennsylvania common law); *cf. Atalese,* 219 N.J. at 444 (confirming that New Jersey has the same "clear and unmistakable" legal standard as Pennsylvania). The *Schwartz* court further held: "[w]hether or not Schwartz received a copy of the subscription agreement, he could not accept services he knew were being tendered on the basis of a subscription agreement without becoming bound by that agreement." *Id.* at 518.

In its holding, the court directly relied upon the RESTATEMENT (SECOND) OF CONTRACTS § 23 (1981): "[W]here an offer is contained in a writing [a party] may, without reading the writing, manifest assent to it and bind himself without knowing its terms… [A]n offeror or offeree who should be aware of [the terms of a writing] may be bound in accordance with them if he manifests assent." Crucially, the Third Circuit took notice of "common sense" and recognized that commercial relationships do not arise of whole cloth without a corresponding written agreement to which all parties are bound:

> Even resolving all doubts and inferences in Schwartz's favor, it is impossible to infer that a reasonable adult in Schwartz's position would believe that his contract with Comcast consisted entirely of a single promise that the service would be "always on." Comcast offered internet service under the terms of its Subscriber

> Agreement, and Schwartz accepted the service, so the terms of the contract are provided by the Subscriber Agreement."

Id. at 519-20. Indeed, "both parties performed pursuant to the Subscriber Agreement, with Comcast providing the internet service and Schwartz paying the monthly fee." *Id.* at 519 ("the conduct of the parties shows that their relationship was governed by the Subscriber Agreement.").

This Court adopted the identical legal approach and reasoning in *Parrella v. Sirius Xm Holdings*, No. A-4283-19, 2022 N.J. Super. Unpub. LEXIS 59, at *2 (App. Div. Jan. 18, 2022), cert. denied 2022 N.J. LEXIS 526 (June 14, 2022) (Da0559-Da0563). This Court affirmed the trial court's order compelling arbitration "finding [that] mutual assent to the arbitration clause was implied from plaintiff's 'usage—payment, usage of [defendants'] service, [and] extended relationship history [with defendants] . . . .'" *Id.* at *2. This Court rejected the plaintiff's argument that he should not be bound to arbitrate because he did not recall receiving, reviewing or signing an arbitration agreement.

Like the *Schwartz* court, this Court reasoned that "Plaintiff's actions of requesting defendants' services, using those services, and paying for them after receiving the agreement demonstrates his assent to the contractual relationship established under the agreement." *Parrella*, 2022 N.J. Super. Unpub. LEXIS 59, at *12. The court ruled that "[t]hrough his interactions with defendants over

fifteen years, plaintiff manifested an intention to be bound by the agreement's terms, including the submission of any dispute to arbitration." *Id.* at *11*; see also Weichert Co. Realtors v. Ryan*, 128 N.J. 427, 436 (1992).

Similarly, in recently-issued persuasive authority, a Massachusetts court held that an arbitration agreement contained in a partnership agreement governed a dispute between a law firm and a deceased partner's estate—even though the partner allegedly had not signed the agreement. The court reasoned that the partnership agreement was accept[ed] by performance—that is, the unsigned agreement bound the estate based on a course of conduct over several years based upon the partner's "continued performance and acceptance of benefits under the Partnership Agreement constituted and demonstrated acceptance of the terms of this contract." *Cohen v. Nelson Mullins Riley & Scarborough, LLP,* No. 2484CV00283-BLS2, 2024 Mass. Super. LEXIS 59, at *8 (June 10, 2024) (citing *Polaroid Corp. v. Rollins Envt'l Servs. (NJ)*, Inc., 416 Mass. 684, 691 (1993) (citing *Weichert,* 128 N.J. 427, 436)) (Da0511-Da0517). Stated another way, "by acting as though he was a party to the Partnership Agreement, Cohen confirmed that he had accepted its terms." *Id.*

Non-signatories are also bound to agreements to arbitrate on the theory that a party may not knowingly accept benefits of an agreement and induce reliance through their conduct without becoming estopped to deny arbitration.

E.g., E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001); *Deloitte Noraudit A/S v. Deloitte, Haskins & Sells, U.S.*, 9 F.3d 1060 (2d Cir. 1993). Where a non-signatory knowingly seeks and obtains direct benefits from a contract, "equitable estoppel prevents [the claimant] from 'cherry-picking' beneficial contract terms while ignoring other provisions that don't benefit it or that it would prefer not to be governed by such as an arbitration clause." *Haskins v. First Am. Title Ins. Co.*, 866 F. Supp. 2d 343, 350 (D.N.J. 2012) (quoting references omitted). In sum, "courts prevent a non-signatory from embracing a contract, and then turning its back on the portions of the contract, such as an arbitration clause, that it finds distasteful[,]" *E.I. DuPont*, 269 F.3d at 200, provided the moving party has relied on the non-signatory's conduct.

The logic and common sense of cases like *Schwartz, Parrella* and *Cohen* are unassailable and apply squarely here. Even assuming *arguendo* (as they contend) that Respondents did not sign the Account Application binding them to the Client Agreement, Respondents entered into a series of commercial relationships where they invested $1.4 million and received a written New Account Confirmation for each of the six accounts opened. Like any individual who opens an investment account, Respondents would certainly understand that investing more than $1 million with a broker-dealer is governed by written

agreement. Respondents received investment recommendations leading them to invest in multiple mutual funds, receiving written confirmations for each purchase. Respondents were able to monitor the performance through receipt and review of written quarterly account statements and also, *at Respondents' request,* online through SAM. PFSI made these monitoring tools available for Respondents as Respondents watched their investments grow in value by more than $330,000.

As the *Schwartz* court opined in connection with analogous facts, "[e]ven resolving all doubts and inferences in [Respondents'] favor, it is impossible to infer that a reasonable adult in [Respondents'] position would believe that [their] contract with [PFSI] consisted entirely of a single promise …." *Schwartz,* 256 F. App'x at 519-20. Simply put, PFSI offered services under a written contract and Respondents accepted the benefits and terms of that contract, including the predispute arbitration clause. *Id.*

Further, following the same logic of *Schwartz, Parrella*, *Cohen* and *E.I. DuPont de Nemours & Co.,* Respondents are bound by the predispute arbitration clause along with the entire Terms of Use because Respondents accepted the benefits of their multi-year investment relationship with PFSI. For years, PFSI provided the platform for Respondents to receive those benefits, and understandably "expected to arbitrate … disputes in detrimental reliance on

[Respondents'] conduct." *Hirsch v. Amper*, 215 N.J. 174, 195 (2013) (citing *Heuer v. Heuer,* 152 N.J. 226, 237 (1998)); *Facta Health, Inc. v. Pharmadent, LLC*, 2020 U.S. Dist. LEXIS 186892, at *7 (D.N.J. Oct. 8, 2020) (Da0518-Da0524); *KPH Healthcare Servs. v. Janssen Biotech, Inc.*, 2021 U.S. Dist. LEXIS 196095, at *23 (D.N.J. Oct. 8, 2021) (Da0525-Da0535).

The trial court erred in not enforcing the predispute arbitration clause against Respondents, and this Court should reverse.

POINT IV

THE TRIAL COURT ERRED IN CONCLUDING THAT THE PFSI SAM ACCOUNT REGISTRATION WEBSITE DID NOT PROVIDE NOTICE OF THE TERMS OF USE. (2T14:9-2T18:7).

A party can be bound to arbitrate by agreeing to a predispute arbitration clause through website terms of use, provided there is reasonable notice. *E.g., Wollen,* 468 N.J. Super. at 496-97 ("internet contracts are not all that different from traditional, written contracts containing arbitration provisions (citing *Hoffman v. Supplements Togo Mgmt., LLC*, 419 N.J. Super. 596, 611 (App. Div. 2011)); *Atalese,* 219 N.J. at 445-47. "New Jersey courts have recognized the validity of [web-based] contracts for decades." *Santana v. SmileDirectClub, LLC*, 475 N.J. Super. 279, 286 (App. Div. 2023) (quoting *Wollen,* 468 N.J. Super. at 495).

Here, the trial court erred in concluding that the PFSI SAM Account

Registration website did not provide a "reasonably conspicuous" hyperlink to the PFSI SAM Terms of Use. The trial court erroneously concluded that *Wollen* "applies almost perfectly" to the *facts* of this case (2T15:5-11; 2T16:25-17:18), and did not consider multiple more recent cases with website designs much more comparable to PFSI's than the site analyzed in *Wollen.*

A. PFSI's notice of its terms of use was proper in light of *Vercammen* and *Racioppi.*

Web site registration or sign-up is sufficient for binding a user to terms and conditions. *Vercammen v. Linkedin Corp.,* No. A-0188-20, 2022 N.J. Super. Unpub. LEXIS 110, at *8 (App. Div. Jan. 26, 2022) (enforcing forum selection clause in hyperlinked terms) (Da0568-Da0572); *Racioppi v. Airbnb, Inc.*, No. A-0455-22, 2023 N.J. Super. Unpub. LEXIS 1200, at *2-11 (App. Div. July 17, 2023) (enforcing arbitration provision in hyperlinked terms) (Da0564-Da0567). Reasonable notice sufficient to enforce hyperlinked terms and conditions exists where, as here, a registration website advises the user prior to signing-up, without needing to scroll, that further action will bind the user to the hyperlinked terms. *See Vercammen*, 2022 N.J. Super. Unpub. LEXIS 110, at *8-9; *Racioppi*, 2023 N.J. Super. Unpub. LEXIS 1200, at *9-11. Neither the *Wollen* court, nor the court below, addressed this type of agreement, but this Court has done so in the two recent cases of *Vercammen* and *Racioppi.*

In *Vercammen*, the plaintiff registered for access to LinkedIn as a

premium user. To initiate registration, LinkedIn's website required the user to click "Start Your Free Trial," above which a notification stated, "by placing your order you agree to our terms and service." The words "Terms and Service" embedded a hyperlink to the User Agreement. LinkedIn's registration process did not require the user to actually open or view it. Rather, a subscriber had the "option" to view the terms and to "reject[] the contract and LinkedIn's services" if they so chose. *Vercammen*, 2022 N.J. Super. Unpub. LEXIS 110, *9-10. This Court held that LinkedIn's website set forth its terms "in a fair and forthright fashion" because the terms were in a clearly visible notice "presented to the party to be bound" at the outset of the sign-up process, and "not submerged nor hidden." *Id*. Thus, "instead of providing an 'I agree' button," the defendant's site may "advise the user that he or she is agreeing to the terms of service when registering or signing up." *Id.* at *8-9 ("plaintiff cannot assert that he had no notice of the terms.").

In *Racioppi,* Airbnb, Inc.'s website provided on the "first sign-up screen" to register for an Airbnb account, directly below the "Sign up" button *and provided by hyperlink*: "'By signing up, I agree to Airbnb's Terms of Service, Privacy Policy, Guest Refund Policy, and Host Guarantee Terms.'" After conducting a "fact-sensitive inquiry," this Court held that the site provided "clear and unmistakable" notice of the agreement to arbitrate given that

"defendant's first sign-up screen required no scrolling" and set forth the above-quoted language in legible text with accompanying hyperlinks to the referenced policy documents. *Racioppi*, 2023 N.J. Super. Unpub. LEXIS 1200, at *9-11 (citing *Wollen,* 468 N.J. Super. at 495-96). Further, the identical language appeared on the subsequent registration screen, so that the user would continue to see it as they proceeded with signing-up. *Id.* at *10.

Racioppi distinguished *Wollen,* noting that in *Wollen* the user had to "navigat[e] multiple webpages" before finding any reference to separate terms and conditions, whereas in *Racioppi*, as here, such reference "was on the first page encountered by a consumer." *Id.* at *4-6 (citing *Selden v. Airbnb, Inc.*, 4 F.4th 148, 152 (D.C. Cir. 2021) (reaching same conclusion as to Airbnb's registration site because notice of terms "appeared on a single screen," "required no scrolling," and was "clearly legible, appropriately sized, and unobscured by other visual elements). The Court rejected plaintiff's contention that the agreement was inadequate for lack of "underlined, bolded or enlarged" hyperlinks. *Id.* at *7-9; (*cf.* 2T17:12-15).

Here, the trial court erred by reaching the opposite conclusion from *Racioppi* and *Vercammen* and relying solely on *Wollen*. As in both *Vercammen* and *Racioppi,* the SAM Registration website here provided a clear, prominent statement at the outset of an online registration process advising the user that

she would be bound by hyperlinked terms of use (identified in clear blue print that offset it from the other print on the webpage) upon proceeding with registration. There was no need to scroll down on the page to see this statement, and in addition, the SAM Registration website repeated this precise notice on every one of the subsequent pages involved in the user's registration process. In the decision in *Racioppi*, which *post-dated Wollen,* this Court rejected the notion that the lack of an underlined or bold hyperlink, or a check-box to confirm user assent, was fatal. (2T:14:18-25; 2T:17:3-15).

B. As this Court recognized in *Racioppi, Wollen* is distinguishable.

The trial court erroneously stated that *Wollen's* facts fit "almost perfectly" here. (2T16:19-17:6). Yet, unlike with PFSI, the *Wollen* website advised users only after entering seven pages of detailed information— in a disclosure submerged near the bottom of the seventh page— that their use of the site constituted assent to certain terms. Even considering *Wollen* without the benefit of subsequent cases applying it, (i) PFSI's website design, and (ii) the larger context of Respondents' use of the site, are vastly different from *Wollen*. The facts here are such that, even applying *Wollen* in isolation, this Court should reach the opposite outcome from that in *Wollen.*

i. PFSI's SAM registration website provided more prominent, clear, and timely notice than the site in *Wollen.*

In *Wollen*, this Court recognized that terms and conditions through site

use may be enforceable so long as "the terms or a hyperlink to the terms are reasonably conspicuous on the webpage." *Wollen*, 468 N.J. Super. at 496 (quoting *James v. Global Tel*Link Corp.*, 852 F.3d 262, 267 (3d Cir. 2017) ("where the website contains an explicit textual notice that continued use will act as a manifestation of the user's intent to be bound, courts have been more amenable to enforcing browsewrap agreements)). This Court found, however, that the defendant's website provided inadequate notice of its terms because none of the first *six* webpages the plaintiff had to use to submit a request to the defendant "referred the user to [defendant]'s separate terms and conditions webpage." *Wollen*, 468 N.J. Super at 488. The website first notified users at the *bottom* of the *seventh* webpage, at the very end of an information submission form, that "by submitting this request, you are agreeing to our Terms & Conditions." *Id.*

Here, unlike the website in *Wollen*, the SAM Terms of Use were hyperlinked in a central, highly visible, easy-to-spot place on *every page* of the SAM Registration website. This notice was not buried or obscure, and could be found without any scrolling.

Indeed, when Pacheco (already a longtime PFSI client) navigated to the SAM home page and clicked on "First Time User" under the sign-in button, she opened the "Account Registration" page by way of hyperlink. (Da0081-

Da0082; Da0083-Da0084). Immediately upon this page opening—and before commencing any aspect of the registration process using PFSI's site— Pacheco could clearly see text on the center of the web page, without needing to scroll down, stating that

> Your use of this site signifies that you accept our
> Terms and Conditions of Use.

(Da0496 (blue text and hyperlink omitted)). The font of the text setting forth this statement was the same size of the text Pacheco had just clicked (on the SAM home page) to open the Account Registration page. The text was set off entirely on its own in the center of the page, unaccompanied by any other text or visual clutter. (*Id.*) The "Terms and Conditions of Use" explicitly referenced in the notice were identified by bright blue text evidencing a hyperlink, and could be opened by Pacheco instantaneously by simply clicking on that blue text. (*Id.*) At that point, Pacheco was able to read the entire SAM Terms of Use including the agreement to arbitrate.

Pacheco had the opportunity to apprise herself of these terms before proceeding to use of the SAM registration site. The terms also appeared on each subsequent page comprising the registration process. Indeed, the exact same notice and hyperlink quoted above appeared in the center-bottom (again without need to scroll) of each page. (Da0496-Da0498). PFSI thus provided continuous notice during the entire registration process that Pacheco was agreeing to certain

"Terms and Conditions of Use."

Simply stated, the trial court in this case, unlike this Court in *Racioppi* and *Vercammen*, failed to recognize that the design of PFSI's SAM Account Registration was materially different from the site in *Wollen*. *See supra* Pt. IV.A; *see also Lloyd v. Retail Equation, Inc.,* No. 21-17057, 2022 U.S. Dist. LEXIS 233637, at *17 n.2 (D.N.J. Dec. 29, 2022) (holding hyperlink to website sufficiently "clear and unambiguous" so as to be enforceable, and distinguishing *Wollen* given that "the placement of the hyperlink in this case was more closely approximated to ensure assent as it was not hidden below or 'submerged') (Da0536-Da0549); *see also generally Mucciariello v. Viator, Inc.,* No. 18-14444 (FLW), 2019 U.S. Dist. LEXIS 166696, at *9, *17 (D.N.J. Sep. 27, 2019) (finding hyperlinked terms sufficiently prominent and rejecting contention that hyperlinked terms were unenforceable because plaintiff never had to "check a box.") (Da0550-Da0558). Had it done so, it would have reached the opposite result.

ii. The "consumer context" and relationship with the site-user are also distinguishable from *Wollen*.

"'The consumer context of the contract matter[s].'" *Wollen*, 468 N.J. Super at 501-02 (quoting *Kernahan*, 236 N.J. at 320 (citing *Atalese*, 219 N.J. at 444)). The *Wollen* court observed that "the parties in the present matter had no relationship," which made certain cited precedent involving parties with a

"relationship that was established" "inapposite" to the facts before it. *Id.* Likewise, the context and relationship between the parties here renders *Wollen*'s specific application of law to facts "inapposite" here.

Here, Pacheco had been a customer of PFSI for years before she decided to proceed with SAM registration. If she had not chosen to register for SAM access, she would have remained a PFSI client fully able to communicate with PFSI through regular channels like mail and telephone. Whereas in *Wollen* the customer was required to use defendant's website in order to receive any services whatsoever from the defendant—that is, to initiate any relationship with the defendant—here, Pacheco already had a years-long relationship with PFSI, and simply contemplated utilizing voluntary web access to view Respondents' accounts at her leisure. Pacheco's ultimate decision whether to register had no effect on her status as a PFSI client or her ability to continue receiving PFSI's advisory services. By contrast, the consumers in *Wollen* were searching for a contractor to complete home renovation totaling nearly $100,000. In order to receive referrals to qualified contractors, the *Wollen* plaintiffs were *required* to complete a web-based form and submit to the website's terms. Indeed, it was a significant fact in the reasoning of *Wollen* that the parties had no preexisting relationship, unlike here.

One can easily imagine, moreover, a consumer seeking the services of the

defendant in *Wollen* in a situation of duress due to a home-maintenance emergency like a broken pipe or roof leak. It is impossible to conjure such a situation in relation to an existing PFSI brokerage client deciding to sign up for web access to complement their existing lines of communication with PFSI. The facts of this case involve a simple and voluntary decision to utilize an optional PFSI service.

In sum, the trial court misapplied *Wollen* and failed to find that PFSI's SAM registration website provided notice sufficient to bind online to the SAM Terms of Use. Had the trial court properly applied the law to the record, it would have concluded that the Respondents had reasonable notice of the SAM Terms of Use and were bound by the predispute arbitration agreement therein.

CONCLUSION

For all of the reasons stated in the foregoing, PFSI respectfully submits that this Court should reverse the trial court's order denying PFSI's motion to compel arbitration and stay the case, and direct that an order granting such motion be entered.

Respectfully submitted,

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FILED, Clerk of the Appellate Division, August 06, 2024, **A-002643-23**, **AMENDED**

OLGA MARTINEZ and NORMA PACHECO, in her individual capacity and as Power of Attorney for OLGA MARTINEZ, v. BOP FINANCIAL GROUP, LLC, LISA FARAH CALIXTE, LUIS S. JEAN-BART, PFS INVESTMENTS, INC. d/b/a/ PRIMERICA, MARIA MORALES, JOHN DOES 1-10, and XYZ COMPANIES 1-10.	SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION DOCKET NO. A-2643-23T2 ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DOCKET NO. HUD-L-3054-23 SAT BELOW: HON. JOSEPH A. TURULA, P.J.Cv.

PLAINTIFFS-RESPONDENTS' BRIEF IN OPPOSITION TO DEFENDANT-APPELLANT'S APPEAL OF THE TRIAL COURT'S ORDER DENYING DEFENDANT-APPELLANT'S MOTION TO COMPEL ARBITRATION

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PRELIMINARY STATEMENT

This appeal is the latest effort by Defendant-Appellant PFS Investments, Inc. d/b/a Primerica ("Primerica" or "PFSI") to deprive Plaintiffs-Respondents Olga Martinez ("Olga") and Norma Pacheco ("Norma") (collectively, "Plaintiffs") of their rights to seek legal recourse and a jury trial in the Superior Court of New Jersey based on purported arbitration agreements that Plaintiffs have never seen, let alone executed or assented to. Primerica's continued efforts to circumvent Plaintiffs' constitutional rights should be seen for what it is: a self-serving attempt to hide Primerica's and their former employees' unlawful conduct.

As the trial court correctly determined, the Plaintiffs never knowingly and voluntarily waived their rights to bring claims in this forum. Simply put, Plaintiffs could not assent to such a waiver because they never even knew the arbitration agreement existed until after this action commenced. As Primerica tacitly admits, neither Primerica nor their former employee, defendant Luis Jean-Bart ("Jean-Bart"), ever provided an arbitration agreement to Plaintiffs, let alone that Plaintiffs signed the agreement, electronically or otherwise.

Because Primerica cannot dispute that the Plaintiffs were never provided with the arbitration agreement at any time before this lawsuit was filed, they instead attempt to posit a novel theory that Plaintiffs should be compelled to

arbitrate and foreclosed from accessing this Court for relief because they "receiv[ed] the benefits" of Primerica's "investment advice." This argument falls flat, however, when faced with the reality that Primerica's willful or negligent conduct resulted in the theft of more than four times the amount of "returns" that Primerica's "advice" yielded.

Met with the reality that this argument is baseless, Primerica also attempts force in an argument that was improperly presented to the motion judge for the first time in its reply brief based on a browsewrap agreement hidden in Primerica's website. Putting aside that Primerica improperly attempted to raise this new argument for the first time in its reply, Primerica offers no proof that 96-year-old Olga, or her goddaughter and power of attorney, Norma, personally accessed their website or "register[ed] for online access." At best, Primerica's Chief Operating Officer, William J. Nemetz ("Nemetz"), who never met or spoke to Plaintiffs, offered an opinion that someone accessed their website after their former employees defrauded the Plaintiffs. Critically, neither Nemetz nor Primerica have personal knowledge of the "facts" contained in his certification in violation of Rule 1:6-6, and not one of Primerica's business records supports their allegations. And even if this Court were to consider Nemetz's unsubstantiated allegations, raised for the first time in Primerica's reply submission and before Plaintiffs had the opportunity to conduct any discovery

on this issue, Primerica also ignores the abundance of *published* caselaw that squarely addresses and invalidates the browsewrap agreement.

Plaintiffs have suffered significant and potentially permanent financial harm due to Primerica's and its former employees' misconduct. Rather than direct their disdain to their employees/former employees - including Jean-Bart, who Primerica terminated for the unlawful conduct alleged in Plaintiffs' Complaint while Primerica's motion to compel arbitration was pending – Primerica instead focuses their ire on Plaintiffs, the victims of a fraudulent scheme and Primerica's negligence that resulted in the theft of Olga's life savings. Primerica's continuing efforts to deprive Plaintiffs of their rights to have this case adjudicated in the proper forum before a jury must come to an end. For the reasons set forth more fully below, this Court should affirm the motion judge's order denying Primerica's motion to compel.

PROCEDURAL HISTORY

On August 29, 2023, Plaintiffs filed a Complaint against Primerica, Jean-Bart, BOP Financial Group, LLC ("BOP"), Lisa Farah Calixte ("Calixte"), Maria Morales ("Morales"), John Does 1-10, and XYZ Companies 1-10. (Da001-0042.) Plaintiffs assert claims of Accounting (Count One); Breach of Fiduciary Duty (Count Two); Fraud/Fraudulent Inducement (Count Three); Violation of Consumer Fraud Act, N.J.S.A. § 56:8-1, et seq. (Count Four); Aiding and Abetting (Count Five); New Jersey Civil RICO (Count Six); Violation of RICO, 18 U.S.C. § 1962 (Count Seven); Civil Conspiracy (Count Eight); Breach of Contract (Count Nine); and Negligence (Count Ten). Specifically, Plaintiffs asserted Counts Eight and Ten against Primerica. (Ibid.)

On November 8, 2023, Primerica moved to compel arbitration and stay the proceeding, asserting Plaintiffs agreed to a pre-dispute arbitration provision in account applications that, on their face, do not contain any indicia of signatures by either Plaintiff (the "Motion to Compel"). (2T7:1-4; Da0088-188.) The entirety of Primerica's Motion to Compel was based on unauthenticated exhibits and hearsay that Primerica attempted to shoehorn into the record through its counsel. (See Da71-492.) Primerica's former employees and co-defendants, Jean-Bart and Morales, similarly filed motions to compel arbitration based on the same "proofs" submitted with Primerica's Motion to Compel.

(2T7:5-14.) Notably, Jean-Bart and Morales did not submit any certifications based on personal knowledge and simply relied on the arguments raised in Primerica's Motion to Compel. (See Da0001-0614.)

Plaintiffs opposed the Motion to Compel, and Jean-Bart's and Morales' motions, asserting that they never saw, reviewed, executed or agreed to an arbitration provision in the account applications, which were, in fact, completed by Jean-Bart, and therefore Plaintiffs did not, and could not, knowingly waive their right to pursue relief in the Superior Court. (Da63-66.) Primerica attempted to present applications through a certification from someone with no personal knowledge of the matter. (2T9:3-21.)

In reply, for the first time, Primerica claimed that Plaintiffs agreed to the "PFSI Shareholder Account Manager" ("SAM") website's Terms of Use, which contained an agreement to arbitrate. (See 2T9:19-10:18.) Primerica's reply further included a certification from Primerica's COO, Nemetz, who similarly attempted to certify "facts" outside of his personal knowledge and otherwise unsubstantiated by Primerica's business records. (Da0071-87.)

Plaintiffs' counsel objected to the inclusion of this additional argument in reply and the motion judge determined that facts not contained in the initial merits brief were included in reply. (1T9:2-14; 1T22:310.) The motion judge reserved decision on the matter. (1T48:5-22.) On April 12, 2024, the trial court

entered an order denying the motion to compel arbitration and issued an oral opinion on the record. (Da0499-Da0500.) In pertinent part, the court determined that, without any evidence or certifications disputing Norma's sworn certification that neither she nor Olga "ever reviewed the arbitration— provisions with them or explained that they would be waiving their rights to a judicial forum" and the only witness to the potential execution—Jean-Bart—had not submitted a certification in support of defendants' motions, there was insufficient evidence to find that Plaintiffs assented to the arbitration agreement. (2T13:20-14:8.) As to the "SAM Program registration," the motion judge found that the matter was squarely within Wollen v. Gulf Stream Restoration & Cleaning, LLC's holding and the only distinguishable fact was that Plaintiffs had a prior relationship with Primerica. (2T16:19-17:18). Most notably, "[l]ike the terms and conditions of Wo[l]len, [Norma] was not required to affirmatively assent to a review of the terms and conditions prior to registering for the SAM program."

This appeal followed.[1]

[1] On May 28, 2024, Jean-Bart filed a miscellaneous letter, which was marked deficient by the Clerk of the Appellate Division, requesting to join Primerica's appeal. Not only was the letter filed out of time, but Jean-Bart never cured his deficiencies or filed a timely brief. As such, any submission in support of Primerica's appeal by Jean-Bart is requested to be deficient and ignored by this Court.

STATEMENT OF FACTS

A. Jean-Bart Induces Plaintiffs To Invest Olga's Life Savings With Primerica

This matter arises from the fraudulent theft of Olga's life savings. Olga is 96 years old, she cannot speak or read English, and has no financial background. (Da63, ¶ 3.) Olga's goddaughter, caretaker, and designated power of attorney, Norma, like Olga, has no financial background and has limited proficiency in English. (Da5-6, ¶ 18.) In early 2018, Olga appointed Norma as her agent to assist with financial and healthcare matters. (Da64, ¶ 5.) At Olga's request, Norma agreed to assist her with her finances and help her find a trusted financial advisor to invest Olga's savings that she had accumulated over her lifetime. (Ibid.)

In April 2018, Norma was contacted by Jean-Bart, a financial advisor working with Primerica, about investing with him through Primerica. (Id., ¶ 6.) Jean-Bart had worked with several individuals in Plaintiffs' community who had vouched for him, and after a meeting among Plaintiffs, Jean-Bart, and Jean-Bart's wife at Olga's house, Plaintiffs orally agreed to invest with Jean-Bart/Primerica. (Da64-65, ¶¶ 7-8, 13.) During the meeting, Jean-Bart represented that he helped other individuals in similar situations as Plaintiffs. (Da64, ¶¶ 9-11.) He promised Olga and Norma that he would invest Olga's money responsibly through Primerica. (Ibid.)

At no time during this meeting were Plaintiffs informed that by investing with Primerica they would be waiving their right to sue Jean-Bart, Primerica, or anyone else in the Superior Court of New Jersey or were waiving their right to a jury. (Da65, ¶ 12.) In fact, at no point during this meeting did Primerica's representative, Jean-Bart, provide Plaintiffs with any "Account Application" or show Plaintiffs an arbitration agreement or arbitration provision in any other agreement. (See id., ¶¶ 12-16.) Further, Jean-Bart did not explain to Plaintiffs that they would be waiving any of their constitutional or statutory rights or that they would have to agree to arbitrate any and all disputes against Primerica. (Da65-66, ¶¶ 14, 17.) At no point during their initial meeting with Primerica's representative and agent, Jean-Bart, did Plaintiffs ever read or execute any agreement that included an arbitration provision; Plaintiffs did not even access a computer during this meeting. (Ibid.) Rather, Jean-Bart assured Plaintiffs that he would take care of any necessary paperwork to set up their brokerage account. (Da0065, ¶ 13.)[2]

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[2] Neither Primerica nor Jean-Bart submitted any certification or testimony to the trial court to contradict Norma's sworn statements. As the trial court correctly noted, Plaintiffs' factual claims are uncontested. (2T14:4-5.)

B. Primerica Fails To Oversee And Monitor Its Employees, Allowing The Other Defendants To Perpetrate Fraud And Steal Over $1.4 Million Dollars From The Plaintiffs

In the Spring of 2022, Jean-Bart contacted Norma and advised her of a potential investment opportunity with BOP, an "investment club," that other members in Plaintiffs' local community had invested with. (Da6, ¶ 24.) Jean-Bart introduced Plaintiffs to co-defendant Lisa Calixte, and through a series of misrepresentations, induced Plaintiffs to invest with BOP. (Da7-08, ¶¶ 28-31.) Given Plaintiffs' history with Jean-Bart, their limited financial knowledge, and the representations made about Calixte and BOP, Plaintiffs relied upon these representations and indicated that they wanted to transfer a portion of Olga's investments from Primerica to BOP. (D10, ¶ 37.)

Jean-Bart advised Norma to withdraw funds from Olga's Primerica account and deposit them into Olga's Wells Fargo account. From there, Norma was to deposit the funds directly to BOP. (Da10, ¶ 38.) To facilitate the transfers, Jean-Bart had his assistant, Morales (another former Primerica employee), accompany Norma to Plaintiffs' bank to effect wire transfers to BOP. (Da11, ¶¶ 41-45.) Morales represented that she worked for Primerica and Jean-Bart, and accompanied Norma three times to ensure the wiring of $2.1 million to BOP. (Da11, ¶¶ 41-45.)

From there, the BOP made a significant number of high-risk investments, despite representations that they would only engage in low-risk investments. (Da14, ¶ 54.) During this time, Jean-Bart and Morales represented that Plaintiffs had made significant gains. (Da19, ¶ 67.) After repeatedly requesting updates and confirmations about Plaintiffs' funds, Jean-Bart and BOP finally provided some information regarding the status of Plaintiffs' funds, which included documents evidencing substantial losses and Primerica's employees' fraud and theft from the Plaintiffs. (Da20-22, ¶¶ 71-94.)

C. Primerica Attempts To Strongarm Plaintiffs To Arbitrate Their Claims Based On Agreements That Plaintiffs Never Reviewed Or Executed, Speculation, And Hearsay

After Plaintiffs commenced the underlying litigation, Primerica filed its Motion to Compel based on the arbitration provision in the Account Application. (Da66, ¶ 17.) Norma certified, among other things, that the Plaintiffs never saw these applications or any arbitration agreement, and that there was no computer present during her initial meeting with Jean-Bart. (Da65, ¶ 14.) The Plaintiffs could not have possibly signed the Account Applications, electronic or otherwise. (Ibid.) If Plaintiffs knew the legal implications of the arbitration provision in the Client Agreement, and if Jean-Bart or Primerica explained any of the legal implications to them, they would have requested to review the purported agreements with an attorney. (Da65, ¶ 15.)

LEGAL ARGUMENT

POINT ONE

STANDARDS GOVERNING APPEAL

An appellate court conducts a de novo review when determining the enforceability of arbitration agreements. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186, (2013). In conducting this review, the Court considers (i) whether the parties entered into a valid and enforceable agreement to arbitrate disputes, and (ii) whether the dispute falls within the scope of that agreement. Id. at 187-88. While this Court need not give deference to the trial court's analysis, it may do so where the analysis is persuasive. Wollen v. Gulf Stream Restoration & Cleaning, LLC, 468 N.J. Super. 483, 495 (App. Div. 2021) (quoting Kernahan v. Home Warranty Adm'r of Fla., Inc., 236 N.J. 301, 316 (2019)).

An appellate court need not consider matters not properly raised below. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2022). Here, Primerica—again—attempts to present issues not raised in its merits brief below. State v. Smith, 55 N.J. 476, 488 (1970) (stating that a party is not permitted to use a reply brief to enlarge his or her main argument); Berlin v. Remington & Vernick Engrs, 337 N.J. Super. 590, 596 (App. Div.) ("Raising an issue for the first time in a reply brief is improper."), certif. denied, 168 N.J. 294 (2001). As discussed more fully

below, Point IV of Primerica's brief (Db18-27) should only be considered if it meets the plain error standard under Rule 2:10-2. "Relief under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and 'should be sparingly employed.'" Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957)).

POINT TWO

PLAINTIFFS DID NOT, AND COULD NOT, WAIVE THEIR CONSTITUTIONAL RIGHTS TO A JURY TRIAL BECAUSE PLAINTIFFS NEVER KNEW ABOUT, SIGNED, OR ASSENTED TO THE ARBITRATION AGREEMENT

The motion judge correctly determined that Plaintiffs did not waive their rights to a jury trial because Plaintiffs never signed an arbitration agreement. (2T13:20-14:8; see also Da65, ¶ 13.) Without executing an arbitration agreement, Plaintiffs could not have knowingly and voluntarily waived their rights to seek relief in our court system. Primerica effectively admits that Plaintiffs never reviewed or executed the Account Applications or Clients Agreements, and, instead, attempts to compel arbitration based on their novel "course of conduct" and "acceptance of benefits" theories. However, these arguments are likewise unsubstantiated by the record and are devoid of any support from precedent binding this Court. Notably, none of the caselaw Primerica relies on -- the majority of which is unpublished or from ancillary

jurisdictions -- overcomes the facts that Plaintiffs never executed an arbitration agreement and, up until the initiation of this matter, never knew of the arbitration agreement. The order denying Primerica's Motion to Compel should be affirmed because Plaintiffs did not assent to arbitration and never waived their constitutional right to a jury trial.

A. The Public Policy in Favor Of Arbitration Has Hard Limits

The Federal Arbitration Act ("FAA") preempts state laws that may prohibit arbitration agreements; however, the FAA likewise permits states to regulate arbitration agreements under standard contract law principles. See Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002). In reviewing arbitration agreements, "basic contract formation and interpretation principles still govern, for there must be a validly formed agreement." Kernahan, 236 N.J. at 307 (citing Volt Info Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 478 (1909); Garfinkle v. Morristown Obstetrics, 168 N.J. 124, 132 (2001)). Indeed, as the United States Supreme Court held in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), state law principles governing contract formation apply to arbitration agreements. See Kernahan, 236 N.J. at 307; see also Fawzy v. Fawzy, 199 N.J. 456 469 (2009) (stating that arbitration is a "creature of contract").

Under New Jersey contract law, a person must "*knowingly and voluntarily*" waive their statutory rights. Martindale, 173 N.J. at 96 (emphasis

added). Under basic New Jersey law, a legally enforceable contract necessitates "a meeting of the minds." Morton v. 4 Orchard Land Trust, 180 N.J. 118, 120 (2004).

As to arbitration and the waiver of the right to pursue a case in a judicial forum, "courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Atalese v. U.S. Legal Servs. Grp., 219 N.J. 430, 442 (2014). New Jersey courts have repeatedly stated that "[t]he point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." Garfinkel, 168 N.J. at 132 (2001) (quoting Marchak v. Claridge Commons, Inc., 134 N.J. 275, 282 (1993)); see also Guidotti v. Legal Helpers Debt Resolution, L.L.C., 716 F.3d 764, 771 (3d Cir. 2013) (explaining that "a judicial mandate to arbitrate must be predicted on the parties' consent" (citation omitted)). An agreement to arbitrate, like any other contract, "must be the product of mutual assent, as determined under customary principles of contract law." Atalese, 219 N.J. at 442. Specifically, "an effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights." Ibid.

In determining whether a matter should be submitted to arbitration, a court must evaluate (1) whether a valid agreement to arbitrate exists, and (2) whether

the dispute falls within the scope of the agreement. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985); Martindale, 173 N.J. at 92. "The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." N.J.S.A. 2A:23B-6(b). Moreover, it is Primerica's burden to establish whether the matter is subject to arbitration. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Catone Research Inc., 427 N.J. Super. 45, 59 (App. Div. 2012). Primerica, as the trial court correctly found, was, and still is, unable to satisfy their burden.

1. Plaintiffs never entered into a valid arbitration agreement or assented to arbitrate their claims against Primerica or any other defendant.

The first step in assessing a motion to compel arbitration is determining whether an agreement to arbitrate exists. On appeal, the issue is whether a defendant can force arbitration where a plaintiff has never seen any agreement and never executed the underlying agreement. The answer remains "no."

Plaintiffs certified that they never received the Account Applications, let alone signed those or any other documents. (Da65, ¶¶ 13-14.) Primerica does not, and cannot, refute this fact. Likewise, Jean-Bart – who induced Plaintiffs to invest their money with him and Primerica in 2018, and who was terminated by Primerica in January 2024 for the very misconduct underlying Plaintiffs' claims – does not dispute that he never provided Plaintiffs any agreements and that

Plaintiffs never executed or agreed to the arbitration provision Primerica relies on in support of their Motion to Compel and this appeal. The Account Applications that Primerica relies on contain no indicia that either Norma or Olga reviewed or signed those documents, or assented to waive any of their rights.

The Supreme Court has firmly stated that "an arbitration provision cannot be enforced against an [individual] who does not sign or otherwise explicitly indicate his or her agreement to it." Leodori v. Cigna Corp., 175 N.J. 293, 306 (2003). Plaintiffs confirmed they did not sign the documents. (Da65, ¶¶ 13-14.) The sole witness to these purported "signatures" was Jean-Bart, the fraudster, casting further doubt on the authenticity of any agreement. (See, e.g., Da101-02.) As the trial court correctly noted, Plaintiffs' factual claims are uncontested. (2T14:4-5.)

Moreover, there is no dispute that the arbitration provision was never explained to Plaintiffs nor was a Spanish version of the agreement ever provided to Plaintiffs. Olga cannot read or understand English and Norma only has a limited ability to read and understand English. (Da63, ¶¶ 3-4.) It is essential to any agreement there be a meeting of the minds, and that clearly did not occur here.

2. Plaintiffs did not knowingly and voluntarily waive their rights to a jury trial.

The trial court correctly found Plaintiffs never knowingly waived their right to a jury trial. To be effective, a waiver of the right to sue must be "knowing and voluntary." See Atalese, 219 N.J. at 449. New Jersey courts have adopted a "totality of the circumstances" test to determine whether an arbitration agreement is sufficiently clear to waive statutory claims. See Swarts v. The Sherwin-Williams Co., 244 N.J. Super. 170, 178-79 (App. Div. 1990). Under that test, a court must consider the following non-exhaustive factors to determine whether a waiver was "knowing and voluntary":

> (1) The plaintiff's education and business experience; (2) the amount of time the plaintiff had possession of or access to the agreement before signing it; (3) the role of plaintiff in deciding the terms of the agreement; (4) the clarity of the agreement; (5) whether the plaintiff was represented by or consulted with an attorney; and (6) whether the consideration given in exchange for the waiver exceeds [other] benefits . . . entitled by contract or law.
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> [Id. at 177 (quoting Coventry v. United States Steel Corp., 856 F.2d 514, 523 (3d Cir. 1988)).]

The goal is to ensure that the parties know that in electing arbitration, they are waiving their time-honored right to sue. Marchak, 134 N.J. at 282.

Applying these factors here, the Plaintiffs could not knowingly and voluntarily waive their right to bring claims in the New Jersey Superior Court,

and Primerica's suggestion that Plaintiffs were "ignoran[t]" is belied by their own admissions and their former employee's, Jean-Bart. (Db2.) The trial court correctly found that Plaintiffs were never in possession of an arbitration agreement, and therefore Primerica could not demonstrate any of the above factors. (2T12:16-13:13.) Plaintiffs are not experienced investors, have no legal background of any kind, and never saw the documents Primerica relies on until the motions prompting this appeal were filed. Indeed, nobody from Primerica ever gave Plaintiffs the agreements, nor were they included or even referenced in any of the account statements that Primerica relies on to suggest there was some course of conduct that would override our Supreme Court's clear holdings that a party must assent to an arbitration agreement to be bound by its terms. In weighing the totality of circumstances, Plaintiffs did not knowingly and voluntarily waive their right to trial by jury.

B. Primerica's "Acceptance of Benefits" Theory Has No Basis In Law Or Fact.

Primerica relies primarily on two non-precedential decisions to advance its theory that Plaintiffs should be estopped from litigating their claims in State Court. (Db13-15.) Specifically, Primerica cites Schwartz v. Comcast Corporation, 256 Fed. App'x 515 (3d Cir. 2007) and Parrella v. Sirius Xm Holdings, 2022 N.J. Super. Unpub. LEXIS 59 (App. Div. Jan. 18, 2022) for the proposition that because Plaintiffs received benefits from their contractual

relationship with Primerica, they are bound to arbitrate any and all claims against Primerica. Even if this Court were to consider these non-binding decisions, they do nothing to advance Primerica's arguments because: (1) Schwartz solely interprets Pennsylvania contract law, not New Jersey contract law; and (2) both opinions are easily distinguished from the record on appeal.

Primerica's authorities for finding a valid arbitration agreement are not binding on this court. From the onset, the Third Circuit made apparent that Schwartz was non-precedential. Schwartz, 256 F. App'x at 516 ("We write exclusively for the parties[.]"). Parrella, 2022 N.J. Super. Unpub. LEXIS 59, is likewise non-precedential and is not binding on this Court per Rule 1:36-3. ("No unpublished opinion shall constitute precedent or be binding upon any court. . . . [N]o unpublished opinion shall be cited by any court."). Primerica's reliance on these opinions is, therefore, irrelevant to any analysis of the arbitration agreement. Further, as articulated by the court in Schwartz, the opinion was in consideration of Pennsylvania contract law.[3] 256 F. App'x at 518 ("the existence of the arbitration agreement is determined under the law of Pennsylvania"). Even if the apparent and obvious deficiencies in these opinions and Primerica's

[3] Notably, no New Jersey State Court has cited to or otherwise relied upon Schwartz. Further, no other Third Circuit Panel has relied upon Schwartz.

reliance upon them did not exist, both cases are distinguishable from the facts presented on appeal.

In Schwartz, the plaintiff signed up for Comcast in 2003. 256 F. App'x at 516. At the time, Comcast had a policy of sending a welcome packet to new customers that contained a copy of its "Subscriber Agreement" that, in turn, included an arbitration clause. Ibid. The following year, when the plaintiff decided to cancel a portion of his Comcast services, he was required to sign a work order, which contained language indicating that he was "bound by the current Comcast Subscriber Agreement." Ibid.

The Third Circuit determined that the evidence of Comcast's policy to send a welcome packet containing the Subscriber Agreement—and no evidence to the contrary— as well as the plaintiff's receipt and execution of the work order, supported a finding that the plaintiff did in fact, receive and had notice of the Subscriber Agreement. Id. at 518. Although the court concluded that Comcast had demonstrated that the plaintiff was aware of the subscription agreement including the arbitration clause, and the plaintiff failed to present any evidence to refute that claim, it further explained that, "in some cases, a party is excused from the terms of a contract where he never had access to the contract and thus could not make himself aware of its terms." Id. at 520. Such is the case here. The record before this Court is devoid of any evidence that either Norma

or Olga ever received, or had notice of, the arbitration agreement until *after* they commenced the underlying action.

Parrella is likewise distinguishable from the case before this Court. In Parrella, Sirius XM successfully moved to compel arbitration of the plaintiff's claims premised on allegedly false advertisements. 2022 N.J. Super. Unpub. LEXIS 59 at *2. The plaintiff had previous Sirius accounts, but ultimately terminated each account. Id. at *2-3. In 2017, the plaintiff received a promotional advertisement and, while discussing his eligibility for the promotion with a Sirius representative, he signed up for a different subscription. Id. at *3-4. After signing up but prior to the service being effective, he received a welcome package that included an arbitration agreement. Id. at *5-6. Prior to the renewal of the service, the plaintiff also received a notice directing him to consult the agreement. Id. at *8.

The Appellate Division ultimately determined the arbitration agreement was valid because the plaintiff "agreed to and used several trial and full-price service subscriptions and canceled several accounts. Upon the acceptance of each trial and paid subscription use, the defendants provided the plaintiff with a hard copy welcome kit containing the agreement governing the parties' relationship." Id. at *11. "Plaintiff was also informed if he did not want to be bound by the agreement, he could cancel at any time." Id. at *12. Further,

because the plaintiff terminated several other accounts, it was apparent that the plaintiff was familiar with the cancelation process. Ibid. The plaintiff was also unable to dispute that he received the agreement. Ibid. None of these facts are present here, and there is no basis (other than the speculation of Primerica's COO, Nemetz) on which this Court can find that either Norma or Olga implied assent to waive their rights.

Further, Primerica's reliance on Cohen v. Nelson Mullins Riley & Scarborough, LLP, is completely misrepresented. No. 2484CV00283-BLS2, 2024 Mass. Super. LEXIS 59, at *8 (June 10, 2024). In Cohen, the plaintiff was an equity partner at Nelson Mullins Riley & Scarborough, LLP, the defendant. Id. at *2. Cohen was diagnosed with an aggressive form of brain cancer and later died. Id. at *2. His wife, via his estate, sued the law firm alleging that it breached the firm's Partnership Agreement by not fully compensating Cohen for his work during the last year he worked there. The Partnership Agreement includes an arbitration clause. Id. at *3. While there was no evidence that Cohen ever signed the Partnership Agreement, the estate *admitted* in the complaint that Cohen and the law firm "agreed to abide by the terms of the Partnership Agreement which was a valid and binding contract." Id. at *6. Neither of the Plaintiffs have made any admissions here. To suggest Cohen has any relevance to this matter, where Plaintiffs are disputing the existence and validity of the arbitration agreement

and have certified under oath that they never even received the agreement, is baseless.

Key to both Schwartz and Parrella's holdings was that the party opposing arbitration received and could review the arbitration agreement, even though they did not. See Parrella, 2022 N.J. Super. Unpub. LEXIS 59 at *11-12 (stating that the plaintiff did not dispute that he received the agreement); Schwartz, 256 F. App'x at 519 n.3 (stating that the plaintiff did admit in his pleadings that he was party to a subscription agreement, which contained the arbitration provision). And, as to Cohen, the estate actually admitted that the agreement at issue was valid. 2024 Mass. Super. LEXIS 59 at *8. Here, by contrast, the record is clear that Plaintiffs never received or reviewed the Arbitration Agreement. There is nothing in the record indicating that at any point prior to Primerica's filing of the Motion to Compel that Plaintiffs ever received the Arbitration Agreement, and the acceptance of the benefits of a contract, alone, is insufficient to determine a party waived their constitutional rights.

Unlike all of the cases Primerica relies on, there is no evidence that Primerica sent the Arbitration Agreement to either Plaintiff. Even assuming arguendo that Plaintiffs received "written quarterly account statements," (Db17), Primerica utterly fails to explain how those statements apprise the Plaintiffs that they were waiving any of their rights as no statement references

arbitration or any such agreement. There could not have been manifest assent to the terms of the agreement.

POINT THREE

PRIMERICA IMPROPERLY ASSERTS THAT PRIMERICA'S SAM ACCOUNT REGISTRATION PROVIDED NOTICE OF THE ARBITRATION AGREEMENT

Primerica attempts to raise an argument not properly presented to the motion court below as it was only raised in reply. This Court, like the trial court, need not consider this matter as it was improperly raised. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); Pressler & Verniero, Current N.J. Court Rules, cmt. 3 on R. 2:6-2 (2022); Berlin, 337 N.J. Super. at 596 (App. Div. 2001) ("Raising an issue for the first time in a reply brief is improper.").

Because Primerica's moving submission improperly relied on the certification of its counsel, in violation of Rule 1:6-6, rather than an individual who has knowledge of the alleged arbitration agreement (such as Jean-Bart), it attempted to remedy this deficiency through a certification from Primerica's COO, Nemetz. Through that certification, however, Primerica did not simply authenticate the records it submitted in connection with its moving submission, it sought to expand the scope of its arguments to include new theories that were not argued in its moving papers. These new arguments were submitted on

January 26, 2024, 79 days after its moving brief was filed and just five days before the return date of the Motion to Compel.

Regardless of the gamesmanship, the Nemetz certification likewise was replete with opinion, hearsay, and speculation, and was wholly unsubstantiated by Primerica's "business records" (including screenshots from the "Wayback machine," which presumably are not maintained by Primerica in the ordinary course of its business). Here, as they did below, Primerica seeks to incorporate "facts" about the Plaintiffs' registration of an online account and general information about actions allegedly taken by the Plaintiffs that Nemetz and Primerica have no way of knowing.

Because Primerica could not refute that Plaintiffs reviewed or executed the Arbitration Agreement, Primerica improperly presented the theory that because someone registered an account on Primerica's website using the Plaintiffs' personal identifying information, Plaintiffs somehow viewed, read, understood, and assented to the Terms and Conditions contained in a browsewrap agreement, which resulted in Plaintiffs waiving their rights and agreeing to arbitrate claims – even if those claims accrued before the website was accessed. As set forth in Section I, supra, Primerica's Point IV should only be considered if it meets the plain error standard under Rule 2:10-2. "Relief under the plain error rule, R. 2:10-2, at least in civil cases, is discretionary and

'should be sparingly employed.'" Baker v. Nat'l State Bank, 161 N.J. 220, 226 (1999) (quoting Ford v. Reichert, 23 N.J. 429, 435 (1957)). Here, even if the Court were to consider Primerica's untimely argument, there was no error by the trial court because the Nemetz certification and exhibits submitted by Primerica for the first time on reply, still do not provide any evidence that the Plaintiffs personally took any action that demonstrates their assent to arbitrate their claims against Primerica or any other Defendant. For these reasons, and those set forth in Point Four below, Primerica's reliance on the browsewrap agreement in its website is unavailing.

POINT FOUR

THIS COURT HAS REPEATEDLY HELD THAT A CONSPICUOUS BROWSEWRAP AGREEMENT—ALONE—IS INSUFFICIENT NOTICE TO WAIVE A CONSUMER'S RIGHT TO JURY TRIAL

The trial court's determination that the Terms and Use did not amount to an appropriate waiver of Plaintiffs' right to a jury trial was correctly decided and did not contain any error, let alone plain error.

A. Primerica Again Rests Its Arguments On A Certification In Violation Of The Court Rules

For the first time in reply, Primerica argued that its "SAM Account Registration" website provided notice to Plaintiffs that they waived their right to a jury trial. (See Da71-87.) The Nemetz certification outlined the general

procedures and policies Primerica has regarding account registration. (Da77-78.) In violation of Rule 1:6-6, however, Nemetz and Primerica purport that their "business records' somehow demonstrate that Norma personally created an account with Primerica. (Da83-84; Db23.) This is especially troublesome because (1) Nemetz does not have any personal knowledge of whether Norma or Olga ever accessed a computer, let alone registered for an account; (2) Primerica's business records contain no evidence that Norma personally made any account with Primerica; and (3) considering the conduct of Jean-Bart and his fraudulent conduct in this matter, and that the account was created after Jean-Bart "handled" Plaintiffs' initial account applications, any allegation that Norma personally created a SAM account should be called into question.

Indeed, Nemetz certified that "[a]ccording to PFSI business records, Norma Pacheco registered to utilize Primerica's SAM program on June 27, 2022[,]" and "[o]nce Norma Pacheco completed the registration of the user ID and password on the SAM, she was directed to the 'New User Registration Complete' webpage where, again, the same Terms and Conditions of Use in blue hyperlink are set forth on the webpage without scrolling or additional prompts." (Da83-84 ¶¶ 25-26.) To suggest, as Nemetz certified to, that he knows Norma personally completed and registered to use Primerica's SAM website is, at best, speculative, and, at worst, a misrepresentation to the Court. Factual assertions

based on conjecture, as is the case here, cannot be permitted. See Jacobs v. Walt Disney World, Co., 309 N.J. Super. 443, 454 (App. Div. 1998) ("Because Rule 1:6-6 mandates that certifications be based on personal knowledge, factual assertions based merely upon 'information and belief' are patently inadequate." (quoting Patrolman's Benevolent Ass'n v. Montclair, 70 N.J. 130, 133-34 (1976)). If Primerica truly sought to refute the allegations of Plaintiffs, it would have submitted a certification of Jean-Bart (the only other person with knowledge), however, interestingly it did not do so.

Primerica, again, is attempting to certify information that it has knowledge of, through business records or otherwise, to circumvent the fact that Plaintiffs never agreed to arbitrate their claims.

B. The SAM Account Hyperlink Agreement Is Invalid As Evidenced By Caselaw

Primerica, again, relies purely on non-binding authorities and completely ignores precedent that undermines its assertion that Primerica's SAM Account Registration website provided Plaintiffs reasonable notice of an arbitration agreement. Indeed, this Court has made clear that agreements, such as Primerica's "Terms and Conditions of Use" does not provide sufficient notice to consumers.

"An arbitration provision is not enforceable unless the consumer has reasonable notice of its existence." Wollen v. Gulf Stream Restoration &

Cleaning, LLC, 468 N.J. Super. 483, 498 (App. Div. 2021). A party may not claim a lack of notice for purely failing to read the agreement. Skuse v. Pfizer, Inc., 244 N.J. 30, 54 (2020). However, while internet-based contracts are generally valid, "the enforceability of an internet consumer contract often turns on whether the agreement is characterized as a 'scrollwrap,' 'sign-in wrap,' 'clickwrap,' or 'browsewrap'—or a hybrid version of these electronic contract types." Wollen, 468 N.J. Super. at 495-96. As explained in Wollen:

> A browsewrap agreement generally "exists where the online host dictates that assent is given merely by using the site." Unlike clickwrap agreements, "browsewrap agreements do not require users to expressly manifest assent." For that reason, the enforceability of browsewrap agreements may "turn[ ] on whether the terms or a hyperlink to the terms are reasonably conspicuous on the webpage."
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> [Ibid. (alteration in original) (first quoting Berkson v. Gogo LLC, F. Supp. 3d 359, 394 (E.D.N.Y. 2015); and then quoting James v. Glob. Tel*Link Corp., 852 F.3d 262, 267 (3d Cir. 2017)).]

Primerica's reliance on strictly unpublished cases is telling. The Appellate Division has published numerous cases regarding these types of agreements that provide guidance to this Court and illustrate the invalidity of the agreement at issue here. In Hoffman, the defendant's website contained a forum selection provision that was not available to the plaintiff "unless he or she scrolled down to a submerged portion of the webpage where the disclaimer containing the

clause appeared." Hoffman v. Supplements Togo Mgmt., LLC, 419 N.J. Super. 596, 611 (App. Div. 2011). And if a consumer purchased one of the defendant's products, the website would skip ahead to new pages that did not contain the disclaimer. Ibid. Thus, the Appellate Division found that the clause was unreasonably masked from the view of prospective purchasers because of "its circuitous mode of presentation[,]" and therefore, unenforceable. Ibid.

Similarly, in Wollen, the Court considered the instance where a consumer would have to create an account and navigate multiple webpages to submit an internet-based service request. 468 N.J. Super. at 487-88. On the seventh and final webpage contained fields to input the user's contact information. Id. at 488. This final page contained a hyperlink, which, in turn, contained an arbitration agreement. Id. at 488-89. The Appellate Division "found the hyperlink 'vague, ambiguous and misleading' because the hyperlink did not indicate that the user was required to affirmatively assent, read, or acknowledge the terms and conditions before submitting his or her request for service." Santana v. SmileDirectClub, LLC, 475 N.J. Super. 279, 288 (App. Div. 2023) (quoting Wollen, 468 N.J. Super. at 502-03). Critically, the defendant "**did not require [the] plaintiff to open, scroll through, or acknowledge the terms and conditions**." Wollen, 468 N.J. Super. at 503 (emphasis added).

In light of Wollen, the Appellate Division later clarified the difference between enforceable and unenforceable hyperlink contracts/waivers. See Santana, 475 N.J. Super. at 291-292. In Santana, the Appellate Division found an arbitration agreement enforceable because, while the agreement was contained in a hyperlink that the plaintiff would need to open himself, the plaintiff needed to click a box which specifically stated that he agreed to the defendant's terms and conditions (i.e., the hyperlinked agreements). Id. at 290. Had the plaintiff left the box unclicked, he could not have created an account with SmileDirectClub, LLC. Id. at 291. Thus, without affirmatively agreeing to the arbitration agreement, the plaintiff could not proceed with or access the website's services. Ibid.

Here, according to Primerica, when the SAM account was created by whoever accessed and used Primerica's website, the user was required to open the "Account Registration" page. (Da81-84.) On this separate webpage, there was language stating that "Your use of this site signifies that you accept our Terms and Conditions of Use." (Da496.) The "Terms and Conditions of Use" was a hyperlink in which the arbitration agreement was contained. (Ibid.) Whoever accessed this website and created the account was not required to access the hyperlink to continue with the account registration. See Santana,

475 N.J. Super. at 291 (distinguishing the cases where consumers do not need apprise themselves of the terms to proceed with or access the site's services).

As the trial court correctly noted, much like in Wollen, Primerica did not require Plaintiffs "to affirmatively assent to a review of the terms and conditions prior to registering for the SAM Program." (2T17:3-6 (citing Wollen, 468 N.J. Super. at 503-03)). Without any indication to the user that they were required to "affirmatively assent, read, or acknowledge the terms and conditions," the hyperlink is vague, ambiguous, misleading, and otherwise invalid. Santana, 475 N.J. Super. at 288 (citing Wollen, 468 N.J. Super. at 502-03.) An arbitration provision, like Primerica's, is not enforceable without reasonable notice of its existence. Wollen, 468 N.J. Super. 498. Given any user's ability to continue with the registration of a Primerica account without ever needing to open and affirm assent to the terms of the arbitration agreement, Primerica denied those users reasonable inquiry notice of the arbitration agreement. See Santana 475 N.J. at 291.

Further, Primerica continues to rely on inapplicable unpublished and distinguishable cases as "support" for their arguments. For instance, in Vercammen, the plaintiff was, in fact, a lawyer who was challenging LinkedIn's forum selection clause. Vercammen v. Linkedin Corp., No. A-0188-20, 2022 N.J. Super. Unpub. LEXIS 110, *1-2 (App. Div. Jan. 18, 2022). Further, the

plaintiff accessed a "sign-in-wrap," which, unlike the hyperlink here, informs a consumer that upon signing up for a website or account, the consumer agrees to the terms and conditions. Id. at *8. Here, however, the hyperlink applied to anyone simply using Primerica's website. This squarely puts the arbitration agreement at issue in the purview of a "browsewrap agreement" and the same principles detailed in Wollen. Similarly, in Racioppi v. Airbnb, Inc., No. A0455-22, 2023 N.J. Super. Unpub. LEXIS 1200, at *4-7 (App. Div. July 17, 2023), the Terms and Services necessitating arbitration was contained on the first page of the Terms and Services language stating that the agreement has a binding arbitration provision located within the agreement. Thus, the motion judge in Racioppi found that the terms of services contained sufficient notice to a consumer.

In both of these cases, however, the plaintiffs' claims were premised upon allegations related to the access and use of the defendants' websites. This is not the case here. There is no evidence that the Plaintiffs ever used, accessed, or registered for the SAM website. And even if Primerica could have established that in the trial court or on the record before this Court (they do not), Primerica fails to explain how that action demonstrates that Plaintiffs assented to arbitrate claims that arose *before* the registration occurred.

FILED, Clerk of the Appellate Division, August 06, 2024, **A-002643-23**, **AMENDED**

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the trial court's Order denying Primerica's motion to compel arbitration.

Respectfully submitted,

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By: */s/ Kyle Vellutato*
Kyle Vellutato

Date: August 6, 2024

OLGA MARTINEZ and NORMA PACHECO, in her individual capacity and as Power of Attorney for OLGA MARTINEZ, **v.** **BOP FINANCIAL GROUP, LLC, LISA FARAH CALIXTE, LUIS S. JEAN-BART, PFS INVESTMENTS, INC. d/b/a PRIMERICA, MARIA MORALES, JOHN DOES 1-10, and XYZ COMPANIES 1-10.**	**SUPERIOR COURT OF NEW JERSEY – APPELLATE DIVISION** **DOCKET NO. A-002643-23T2** **CIVIL ACTION** **ON APPEAL FROM:** **Superior Court of New Jersey Law Division, Hudson County Docket No.: HUD-L-003054-23** **Sat Below: Hon. Joseph A. Turula, P.J. Civ. D.** **Date of Submission: August 16, 2024**

DEFENDANT-APPELLANT PFS INVESTMENTS, INC. D/B/A PRIMERICA'S REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant PFS Investment, Inc. ("PFSI") should prevail on its appeal because: (1) Respondents were admittedly well aware that an agreement governed their PFSI relationship, and accepted the benefits (including profits) from that agreement for years, and are thus governed by the agreement's terms; and independently, (2) Respondents voluntarily signed up to use PFSI's website, which notified them on the first page and every subsequent page that it was governed by fully available and easily reviewable terms of use that included an arbitration agreement. For these reasons, those set forth below, and those in PFSI's opening brief, the trial court's Order should be reversed.

REPLY ARGUMENT

POINT I

THE *DE NOVO* STANDARD APPLIES.

Respondents rightly acknowledge that the standard of review is *de novo.* Yet they argue that the website disclosure issue argued and ruled upon below is not before this Court because it arose in a reply submission below.[1] (Pb11-12). The trial court heard Respondents' arguments, and gave Respondents an opportunity to file a sur-reply before ruling. (1T13:4-48:22; 2T:5:25-6:22; 11:25-18:7; *see* Pt. 3.A *infra*). The fact that the court below addressed the

[1] Appellant set forth the circumstances in which additional facts arose in opposition and reply submissions below in its Merits Brief (Db4).

website issue, making it part of the record on appeal, *per se* negates Respondents' argument. *See State v. Fuqua*, No. A-3149-17, 2021 N.J. Super. Unpub. LEXIS 1773, at *61-62 (App. Div. Aug. 20, 2021) (Appellate Division is "obliged" to review an issue raised below "albeit belatedly" if it was "ruled upon by the trial court"), cert. denied 251 N.J. 211 (2022).

Respondents incorrectly rely upon N.J.Ct.R. 2:6-2 and *Nieder v. Royal Indem. Ins. Co,* 62 N.J. 229 (1973) in support of their argument. Rule 2:6-2 requires that an appellant identify "in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located[.]" PFSI complied with this Rule. (Db18). *Nieder* is inapposite because it addressed the age-old problem (not present here) of an appellant raising new facts on appeal which were "not presented to the trial court."[2] 62 N.J. at 234. Further cases cited by Respondents concern arguments raised for the first time in an appellant's reply brief, and thus are inapposite. *State v. Smith,* 55 N.J. 476 (1970); *Berlin v. Remington & Vernick Engrs.,* 337 N.J. Super 590 (App. Div. 2001). Finally, N.J.Ct.R. 2:10-2, which allows "plain error" review of matters "not brought to the attention of the trial or appellate court," does not apply. The *de novo* standard applies to all issues.

[2] Respondents present their contested allegations as if "facts" in the record. (Pb7 (citing Da5-6); Pb9-10 (citing Da6-8, Da10-11, Da14, Da20-22)). PFSI objects as these assertions were unsubstantiated below and thus are not part of the record.

POINT II

RESPONDENTS MANIFESTED THEIR ASSENT TO ARBITRATE THROUGH THEIR COURSE OF CONDUCT.

The Third Circuit Court of Appeals, in *Schwartz v. Comcast Corp.*, 256 Fed. App'x 515 (3d Cir. 2007), and this Court in *Parrella v. Sirius Xm Holdings*, No. A-4283-19, 2022 N.J. Super. Unpub. LEXIS 59 (App. Div. Jan. 18, 2022), each found "mutual assent" to arbitrate based upon a party's course of conduct, despite that party having never seen, let alone signed, any pre-dispute arbitration agreement. The logic for applying this principle here is overwhelming: Respondents enjoyed the benefits of investing through PFSI over many years, knowing that a written agreement governed the relationship. Although *Schwartz* is unpublished, this Court may consider it as persuasive authority. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh v. Jeffers,* 381 N.J. Super. 13, 18-19 (App. Div. 2005); *see* N.J.R.Ct. 1:36-3.[3]

The *Schwartz* court held that a valid agreement to arbitrate existed where a cable television subscriber was aware that an agreement governed his subscription but denied ever receiving or reviewing the agreement. 256 Fed. App'x at 518-20. The court held: "it is impossible to infer that a reasonable

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[3] PFSI accurately presented *Cohen v. Nelson Mullins Riley & Scarborough LLP,* 2024 Mass. Super. LEXIS 59 (Mass. Sup. Ct. June 10, 2024) only to illustrate the widespread acceptance that assent to an agreement to arbitrate may be implied solely from conduct in lieu of a signature.

adult in Schwartz's position would believe that his contract with Comcast consisted entirely of a single promise that the service would be "'always on.'" *Id*. Because plaintiff "accepted the service," he became bound by the terms of the subscriber agreement governing the relationship. *See id.*

Here, likewise, Respondents acknowledge that they were aware that a written instrument governed their relationship with PFSI. (Da0065 (aware relationship involved "necessary paperwork" which they trusted Jean-Bart to "take care of"); Pb8). Further, as in *Schwartz,* Respondents indisputably could access their Client Agreements (with its clear arbitration provision) online any time, at the website address provided in the New Account Confirmation sent to Respondents after they opened each account. (Da0076-77; Da0084-85). *Schwartz* instructs that it would be unreasonable for Respondents to believe that their substantial multi-year PFSI relationship was not subject to binding terms. *See* 256 Fed. App'x at 516-18.

Respondents attempt to distinguish *Schwartz* with a single, fundamentally flawed argument– that in *Schwartz*, "the party opposing arbitration received and could review the arbitration agreement[.]" (Pb23). First, this misstates the facts in *Schwartz*. The plaintiff in *Schwartz* stated that "he did *not* receive a copy of the Subscriber Agreement when he began receiving service or at any other time." 256 Fed. App'x at 516-17 (emphasis added). Second, actual receipt of any

agreement is not material under *Schwartz:*

> *Whether or not Schwartz received a copy* of the subscription agreement, he could not accept services he knew were being tendered on the basis of a subscription agreement without becoming bound by that agreement.

Id. at 518 (emphasis added). Third, as Respondents contend was the case in *Schwartz,* Respondents could fully access and easily review the agreement that governed their PFSI relationship. (Da0084-86; Da0065).

The Third Circuit's common sense logic— that any "reasonable adult" would know that an agreement governing their cable subscription contained detailed terms— applies with even greater force here, as Respondents did not merely subscribe for cable, but invested over a million dollars in savings with PFSI. *See id.* at 519-20; (*see* Da0075, 78-79). That *Schwartz* applied Pennsylvania law does not render it unpersuasive (*see* Pb19) given that both state's laws are identical on this point. *Compare id.* at 518 ("'such agreements are upheld only where it is clear that the parties have agreed to arbitrate in clear and unmistakable manner'") *with Atalese v. U.S. Legal Servs. Grp., L.P.*, 219 N.J. 430, 443-45 (2014) ("a waiver of rights – whether in an arbitration or other clause…'must be clearly and unmistakably established.'").

Parella confirms that the *Schwartz* holding aligns with New Jersey law. In *Parella*, this Court held that a plaintiff "manifested an intention to be bound" by the terms of an agreement he never read or signed, and could not recall ever

receiving, given "his interactions with defendants over fifteen years." 2022 N.J. Super. Unpub. LEXIS 59, at *11 (citing *Atalese,* 219 N.J. at 442-43). As here, the plaintiff "did not recall ever receiving" a copy of any account agreement. *Id.* at *7-8. *Parrella* recognizes that a party may, like Respondents here, manifest an intent to be bound to a customer agreement through their course of conduct and notwithstanding whether they recall any agreement. *See id.* at *5-6, 12.

Respondents inaccurately claim that *Parrella* is distinguishable because there, the trial court found that the plaintiff failed to contradict defendant's business records evidencing that it sent copies of agreements to plaintiff. *See id.* at *6-7, 9-10; (Pb21-22). This distinguishes *Parella* only in outcome. Here, similar to *Parella*: (a) Respondents were customers of PFSI for more than five years (Da0075-80); (b) they were admittedly aware of the (obvious) fact that agreements governing their relationship with PFSI existed (Da0065; Da0075-80); (c) they could access those agreements any time on PFSI's website (Da0085-86); (d) Pacheco, who had power of attorney for Martinez, navigated to PFSI's website to register for online access (Da0083-84); and (e) they received the benefits of an extensive relationship with PFSI, enjoying hundreds of thousands of dollars in returns until they decided to withdraw their funds (Da0078-80). Thus, the court below should have found, as in *Parella,* that Respondents' conduct evidenced an intent to be bound, notwithstanding their

claim not to "recall ever seeing" any agreement. (Da0065). Unlike the court in *Parella,* the trial court did not reach these questions, and stopped upon noting that Respondents denied having "signed any physical documents." (2T4:6-10).[4] The trial court overlooked the record and came to the incorrect conclusion.

POINT III

PFSI'S SHAREHOLDER ACCOUNT MANAGER WEBSITE PROVIDED MORE THAN ADEQUATE NOTICE OF ITS TERMS

A. The Record reflects that Respondent Pacheco registered for and accessed PFSI's Shareholder Account Manager (SAM) website.

The trial court observed:

> Regarding the SAM Program registration, it's undisputed that Miss Pacheco registered for the program on June 27th, 2022 and that the use of the program was subject to the terms and conditions that included a pre-arbitration provision.

(2T14:9-13). The record supports this conclusion (Da0080-Da0081; Da0083-Da0084). Respondents submitted nothing contradicting this fact, or ever disputing that they in fact saw the SAM Terms of Use. (*See* 1T38:2-12). Contesting this for the first time on appeal is improper. Similarly, it is improper to now contest the Nemetz certification below which establishes that

[4] Respondents' alleged limited English proficiency is immaterial because (1) Respondents say they never read any document they were provided (*compare* Da0076, 84-86 *with* Da0065), and (2) the inability to read English does not negate assent, *see Rodriguez v. Raymours Furniture Co.*, 436 N.J. Super. 305, 321 (App. Div. 2014), *rev'd other grounds*, 225 N.J. 343 (2016); *Morales v. Sun Constructors*, 541 F.3d 218, 220-222 (3d Cir. 2008).

Respondent Pacheco signed-up for and accessed SAM on June 27, 2022 (Pb24-28). The Nemetz certification speaks for itself and confirms that he spoke on personal knowledge in explaining the relevant records. (Da0071, Da0087).

B. PFSI's SAM website provided adequate notice of its terms of use under the evolution of *Wollen* and its progeny.

This Court has addressed whether hyperlinked website terms presented in a variety of website designs are enforceable, starting with *Wollen v. Gulf Stream Restoration*, 468 N.J. Super. 483 (App. Div. 2021). "[T]he pertinent inquiry," as the parties agree, "is whether [plaintiff] was provided with reasonable notice of the applicable terms, based on the design and layout of the website." *Id.* at 496. *Wollen* did not address whether such notice occurs where (as here) hyperlinked terms appear prominently on the first page of a website's sign-up process and on every subsequent sign-up page. Two more recent, unpublished Appellate Division cases build upon *Wollen* to address such circumstances and present applicable guidance. *See Vercammen v. Linkedin Corp.*, No. A-0188-20, 2022 N.J. Super. Unpub. LEXIS 110 (App. Div. Jan. 26, 2022); *Racioppi v. Airbnb, Inc.,* No. A-0455-22, 2023 N.J. Super. Unpub. LEXIS 1200 (App. Div. July 17, 2023). These cases squarely apply here and confirm that the SAM website provided Respondents more than adequate notice of the terms and conditions of its use. Respondents incorrectly argue that *Wollen* controls while *Vercammen* and *Racioppi* are uninstructive.

In *Wollen*, the Court declined to enforce an agreement to arbitrate in website terms hyperlinked on "the seventh and final webpage" associated with a lengthy "internet-based service request" form. *Wollen,* 468 N.J. Super at 487-88. These facts were crucial to the central issue of notice under the circumstances. *Wollen* involved homeowners who, while in the unenviable position of searching for suitable home repair services, were forced to travel down a seemingly endless path of web pages, all just to hire someone to do anything from fix an exploding pipe to conduct home renovations. Buried at the *end* of that forest of web pages lurked an inconspicuous reference to terms and conditions. *Id.* at 489. Respondents acknowledge some of these material facts (Pb30), but ignore that the record in this case materially differs from *Wollen.*

Here, the SAM Registration website stated front, center, and at the outset of the online registration process—and on each subsequent page, all without any need to scroll—that the user would be bound by hyperlinked terms of use (identified in clear blue print that offset it from the other text) upon proceeding with registration. (Da0081-Da0082; Da0493-Da0498). Also in contrast, Pacheco used the SAM Registration website to voluntarily sign up for an optional service provided by Respondents to existing customers, whereas in *Wollen* the plaintiff had no prior relationship with the defendant and presumably approached the complicated web form under more stressful circumstances.

Thus, *Wollen's* outcome is not instructive given its required "fact-sensitive inquiry," but its progeny provide clearer guidance.

Six months post-*Wollen*, this Court issued its *Vercammen* decision in which it applied the standard in *Wollen* – whether, "under a fact-sensitive inquiry, [ ] the user was provided with notice of the applicable terms." *Vercammen,* 2022 N.J. Super. Unpub. LEXIS 110, at *8 (citing *Wollen,* 468 N.J. Super. 495-96)). There, this Court found adequate notice of a forum selection clause contained in terms of use hyperlinked prominently above a button to sign up for a premium LinkedIn subscription. *Id.* at *8-9. The Court reasoned that the reference to hyperlinked terms of service was "located directly above the button" and thus not "submerged" or "hidden," and that the user could choose to review the terms by simply clicking on the hyperlinked reference. *Id.* at *9. This constituted "fair and forthright" notice. *Id*. That *Vercammen* involved a dispute over a forum selection clause is not material to its holding as to the adequacy of notice. *See generally Atalese,* 219 N.J. at 443-44 ("under New Jersey law, any contractual 'waiver-of-rights provision must reflect that [the party] has agreed clearly and unambiguously' to its terms."). The Court rightly followed *Atalese* and *Wollen* by approaching the website at issue on its unique facts and applying the principle of reasonable notice.

Just over a year later, and shortly before Respondents filed suit, this Court

revisited proper notice of a pre-dispute arbitration clause contained within website terms of service in *Racioppi* – a case on all-fours with the present case. 2023 N.J. Super. Unpub. LEXIS 1200, at *9-11. Applying the "fact-sensitive inquiry" described in *Wollen*, the Court found that "reasonable notice" existed where "defendant's first sign-up screen required no scrolling" to reveal a notice that "By signing up, I agree to Airbnb's Terms of Service…," which were hyperlinked immediately below. *Id.* at *9-10. The Court determined "[t]here is no question that the clarity and placement of defendants' [terms] sufficiently departs from the facts of *Wollen*[,]" and thus enforced the arbitration provision within the hyperlinked terms. In particular, the Court found that Airbnb's web interface referenced its terms "on the first page encountered by a consumer," unlike in *Wollen* where plaintiff was required to "navigat[e] multiple webpages – none of which referred to the defendant's separate terms[.]" *Id.* at *6, 10. The same result, applying *Wollen*, is appropriate here. It was not the case, as the court below held, that *Wollen* "applies almost perfectly" to the record of this case. (2T15:5-11; 2T16:25-17:18). The Order below must be reversed.

C. *Wollen* and its progeny do not require expressed affirmative assent to the terms of service.

Wollen makes clear: "Our decision should not be interpreted to suggest that a consumer contract cannot be formed by reference to a hyperlinked document, or that we are invalidating browsewrap agreements in toto." *Wollen*,

468 N.J. Super at 487-88. Likewise, *Racioppi* and *Vercammen* both relied on *Wollen* and enforced hyperlinked terms of use where the website did ***not*** require affirmative assent. *See supra* Pt. III.B. Respondents thus have no support for their assertion that, under *Wollen,* a website must require "open and affirm assent" to terms of use in order for such terms to be enforceable. (Pb31-32). Under Respondents' misplaced view, only "clickwrap" agreements— those requiring users to "consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with the internet transaction," *id.* at 496— would be enforceable, while "browsewrap" and "sign-in wrap" would be unlawful *per se*. (Pb30-32). This is contrary to the "fact-intensive" inquiry that *Wollen* requires for the review of any website agreement.

Moreover, *Wollen* analyzed whether the website required users to affirmatively open and review the hyperlinked terms precisely because the website did not provide prominent notice of those terms. *See id.* at 489, 502. The context is vastly different in *Racioppi*, *Vercammen*, and here, where the websites give prominent notice of hyperlinked terms without any need to scroll.

D. Respondents' attempts to distinguish *Racioppi* and *Vercammen* are not supported by the case law.

As summarized in *Wollen*, there are a numerous types of web designs, including "hybrids" of multiple designs, which provide adequate notice of website terms and conditions. 468 N.J. Super at 495-96. While such

terminology has helped the courts understand this space, the standard is the same: reasonable notice under the facts and circumstances. *E.g., Wollen*, 468 N.J. Super at 496 ("Regardless of a web-based agreement's characterization…the pertinent inquiry is whether the user was provided with reasonable notice."). Respondents have attempted to draw a bright line between *Wollen*, on the one hand, and *Racioppi* and *Vercammen* on the other, claiming that *Wollen's* holding is limited to "browsewrap" web agreements while the other two are limited to "sign-in wrap" web agreements. (Pb32-33). This bright line does not exist.

For example, in *Wollen*, although the court observed in its factual recitation that the defendant used what appeared to be a browsewrap design, the Court did not mention the type of design whatsoever in conducting its "fact-intensive inquiry" and determining whether "reasonable notice" existed. 468 N.J. Super at 500-03.[5] The *Racioppi* court applied the exact same standard, and made no finding as to which category of "wrap" best characterized the defendant's web design. 2023 N.J. Super. Unpub. LEXIS 1200, at *1-10. *Vercammen* applied the very same legal test to what that panel considered a sign-in-wrap. 2022 N.J. Super. Unpub. LEXIS 110, at *8. Thus, the lawfulness of

[5] The *Racioppi* decision remarked that it considered *Wollen* to involve a sign-in wrap agreement, underscoring that these factual matters are subject to interpretation. *Racioppi,* 2023 N.J. Super. Unpub. LEXIS 1200, at *5.

an agreement does not rise or fall with the court placing the agreement in a particular box. Here, regardless of what category or label is appropriate, the material question is whether under the facts and circumstances the SAM Registration website afforded its users reasonably conspicuous notice of the terms of use, and this standard was met here.

Respondents' attempt to distinguish *Racioppi* and *Vercammen* by asserting that each involves "claims premised upon allegations related to the access and use of the defendants' websites" (Pb33) is a flawed distinction. In *Racioppi*, for example, the plaintiffs sued Airbnb when another user cancelled their rental and caused plaintiffs to expend additional monies to book a replacement rental nearby. 2023 N.J. Super. Unpub. LEXIS 1200, at *1-4. Airbnb's web interface was only material to whether Airbnb adequately notified plaintiff of website terms, which, as here, existed in a document accessed via hyperlink from Airbnb's sign-up page. *Id.* at *4-10. The Court's holding that Airbnb provided reasonable notice of its terms of use did not hinge on whether the parties' dispute related to the website. *See id.* The same is true of *Vercammen.* 2022 N.J. Super. Unpub. LEXIS 110, at *6-10.[6]

[6] Appellant did not discuss *Hoffman v. Supplements Togo Mgmt.* in its merits brief because it is clearly inapposite for pre-dating *Wollen* and rejecting use of "submerged" website terms the user would not know even existed unless they scrolled near the bottom of the webpage. 419 N.J. Super. 596, 611 (App. Div. 2011). Respondents acknowledge these material facts (Pb29-30).

Finally, Respondents' reliance on *Santana v. SmileDirectClub, LLC*, 475 N.J. Super. 279, 291-92 (App. Div. 2023) is misplaced. There, the Court enforced an arbitration agreement presented in a clickwrap format after applying the usual standard: whether the website "put a reasonably prudent user on inquiry notice of the terms." *Id.* at 288, 291 (citing *Wollen,* 468 N.J. Super at 502). *Santana* did not, as Respondents posit (Pb32), hold that a click-wrap design must be used or suggest that other designs are unlawful under *Wollen*.

CONCLUSION

For all of the reasons stated in the foregoing and in PFSI's merits brief, PFSI respectfully submits that this Court should reverse the trial court's order denying PFSI's motion to compel arbitration and stay the case, and direct that an order granting such motion be entered.

Respectfully submitted,

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